

A Case of Advice or State Intimidation?



By Paul Engel

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- When does government encouragement become coercion?
- Do government actors have a legal responsibility to manage a business's "repetitional risk"?
- Can government uses its power to encourage others not to do business with you?

If there's a boogie man in the anti-gun community, it's probably the National Rifle Association. Accused of complicity in almost every gun crime from gang violence to mass murder, the NRA has become the lightning rod for the vitriol of those whose fear of firearms has grown to an irrational state. What happens though, when government actors advice others about the dangers of doing business with such a company? Is it merely warning of the dangers of sleeping with dogs, or an attempt to use their power to intimidate others into abandoning those they otherwise would do business with? The case of *NRA v Vullo* is just such a case.

Background

When does advice become coercion? That appears to be at the heart of the case *NRA v. Vullo*. The NRA claimed that after the April 2018 shooting in Parkland Florida, Maria T. Vullo, then Superintendent of the New York State Department of Financial Services (DFS), with the assistance of then Governor Andrew Cuomo, used her position to coerce financial companies to stop

doing business with the NRA. In turn, the NRA sued Governor Cuomo and Ms. Vullo in the District Court for the Northern District of New York, alleging, among other things, that the actions of Governor Cuomo and Ms. Vullo violated their rights protected under the First Amendment. Ms. Vullo claimed qualified immunity against such charges. The District Court dismissed all charges except the First Amendment claims against Ms. Vullo, who appealed to the Second Circuit to dismiss these charges. The Second Circuit reversed the District Court's decision, which led the NRA to appeal the case to the Supreme Court.

Oral Arguments for the Petitioner

The Supreme Court heard Oral Arguments on March 18, 2024. We start with the arguments for the petitioner, the NRA.

Government officials are free to urge people not to support political groups they oppose. What they cannot do is use their regulatory might to add "or else" to that request.

Respondent Vullo did just that. Not content to rely on the force of her ideas, she abused the coercive power of her office. In February 2018, she told Lloyd's, the insurance underwriter, that she'd go easy on its unrelated insurance violations if it aided her campaign to weaken the NRA by halting all business with the group. Lloyd's agreed.

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When does urging someone become coercion? As Mr. Cole, attorney for the NRA, mentioned, when the request comes with an "or else". For example, it was one thing for Ms. Vullo to suggest that Lloyd's might want to stop doing business with the NRA, but the promise to go easy if they comply is also a threat to go hard against them if they don't. This is not the only claim that the NRA made.

Six weeks later, she issued guidance letters and a press release directing the thousands of banks and insurance companies that she directly oversees to cut off their ties with the NRA not because of any alleged illegality but because they promote guns.

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At one point Mr. Katyal, attorney for Ms. Vullo, suggested that these guidance letters were nothing special since the NRA had admitted to selling insurance that violated state law. However, Ms. Vullo did not issue guidance letters only to insurance companies, but to banks and other financial institutions as well. If these letters were to punish the NRA for their insurance program, why encourage banks to stop doing business with them? While these guidance letters do not specifically say “do this or else”, remember DFS does regulate them. Just as Ms. Vullo could make life easy or hard for Lloyds, she could for any company regulated by her agency.

Ms. Vullo was not working on this alone.

In the accompanying press release, Vullo’s boss and co-defendant, Governor Andrew Cuomo, said he directed Vullo to issue the guidance because doing business with the NRA “sends the wrong message.” Shortly thereafter, Vullo extracted legally binding consent orders from the NRA’s three principal insurance providers, barring them from ever providing affinity insurance to the group ever again, no matter how lawfully they do so.

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Apparently, Ms. Vullo’s “warnings” were effective.

These actions worked as multiple financial institutions refused to do business with the NRA, citing Vullo’s threats.

This was not about enforcing insurance law or mere government speech. It was a campaign by the state's highest political officials to use their power to coerce a boycott of a political advocacy organization because they disagreed with its advocacy.

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Sounds pretty bad for Ms. Vullo. Then again, we haven't heard the other side of the case yet. Before we look at the respondents arguments, let's look at some of the questions the judges had for Mr. Cole.

The NRA is claiming that their freedom of speech is being violated. Justice Thomas asked about that.

JUSTICE THOMAS: Mr. Cole, what is the speech here, protected speech, that you allege has been suppressed?

1. COLE: Promoting guns, advocating for gun rights, sending the wrong message. It is – it is that – it was – it's precisely the speech of the NRA which caused Vullo and Cuomo to decide to target their – their partners and seek to coerce them into boycotting the NRA. So they are seeking to penalize the NRA because of its speech advocating for gun rights.

JUSTICE THOMAS: So your argument is that the sanctions on a third party suppress the speech of NRA?

1. COLE: Yeah, it doesn't – Your Honor, it doesn't – the Court's First Amendment jurisprudence does not require proof of suppression. It requires proof of burden. If Vullo had imposed a \$1 fine on the NRA for promoting guns, it would be unquestionably unconstitutional even though it wouldn't actually suppress their speech.

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Arguments

That's an interesting approach. Do the actions of Ms. Vullo suppress speech, burden speech, or abridge the right of free speech? More on that, and the applicability of the First Amendment later.

Justice Jackson brought her understanding of the issue to light in one of her questions.

JUSTICE JACKSON: I mean, that's – so – so that's why we have to be really careful about what you're alleging is the First Amendment problem because the government can regulate conduct, correct?

1. COLE: I agree. And if this was a case in which the government had said, you know, the NRA is violating the law left and right and we have to respond to that and here are the legal obligations, that would be one thing.

That is not what they said. They said we want to shut the NRA down, we want to put the gun lobby out of business. Why – the title of the guidance letters that she issues are Guidance Regarding the NRA and Other Gun Promotion Organizations. The whole guidance is saying, I don't like the fact that people use guns. I don't like the fact that people advocate for the use of guns. We need to stop this. We need to stop this now.

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So this doesn't appear to be a case of punishing the NRA for their illegal insurance program, but an attack on any and all gun promotion organizations. Justice Jackson brought up another question related to the freedom of speech issue.

JUSTICE JACKSON: So Justice Kavanaugh picked up on what I think might be a critical distinction, and I'm just trying to understand it. So he said here we have a situation in which

the government is not acting on a company that is itself in the business of speech, which is true, unlike Bantam Books, where it was.

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Mr. Cole based his argument primarily on the case Bantam Books, which is why Justice Jackson brought it up. Do advocacy companies still have free speech rights? From her comparison to the Bantam Books case, this seemed to confuse Justice Jackson. After all, Bantam Books makes books, which to the twisted understanding of the court, is speech rather than press. The NRA's business is advocacy. What is advocacy? The support of a policy or cause. How does one advocate for said policy or cause without expressing such support either by voice, print, or digital publication?

Justice Kagan explored the question of "Reputational Risk:."

JUSTICE KAGAN: But that idea of reputational risk, Mr. Cole, that is a real idea, right?

1. COLE: Yeah.

JUSTICE KAGAN: It wasn't invented for the NRA. There is a view that bank regulators have that companies are supposed to look at their reputational risks.

1. COLE: Right, right.

JUSTICE KAGAN: And so how do we know – I mean, I take – there's obviously a lot about guns in that letter. But it might be that gun advocacy groups, gun companies do impose reputational risks of the kind that bank regulators are concerned about. So how – where do you – how do you – how do we know?

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This raised an immediate question for me. Where does any government get the authority to evaluate the risk to the reputation of an institution? Should a company be concerned about their reputation? I would think so, but on many more levels that what I've seen regulators consider. For example, Justice Kagan seems concerned that guns impose an unfavorable reputational risk to the company. On the other hand I consider businesses that seek to infringe on my right to keep and bear arms to be not only an unfavorable reputation, but cause to avoid doing business with them.

Oral Arguments for the Respondent

Let's go on to the oral arguments presented by Neal K. Katyal for Ms. Vullo.

The key fact in this case is the conceded illegal conduct. As Justice Sotomayor said, the three insurers and the NRA broke the law. They were selling intentional criminal act insurance, and all of the products they offered were unlawful because the NRA refused to get a license. That's why Bantam Books is miles away from this case, and it's why the court below found qualified immunity protects Vullo.

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The foundation of Ms. Vullo's defense appears to be that NRA broke the law, so pretty much any punishment is acceptable.

Second, the fact NRA was doing all of these affinity products without a license. Now, just without a license alone, DFS routinely imposes massive sanctions, including lifetime bans.

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It didn't sound like Justice Alito agreed with Mr. Katyal's view of the situation.

JUSTICE ALITO: – Mr. Katyal, you’re shifting the burden to them. This is a First Amendment case. They – all they need to do is to show that the desire to suppress speech was a motivating factor. They don’t have to prove that the – the regulatory action would have been taken even if Ms. Vullo didn’t have this motivation.

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Mr Cole, in his rebuttal also pointed out a problem with Mr. Katyal’s focus on the NRA’s insurance program, known as Carry Guard.

Carry Guard, Carry Guard is a red herring here. The Carry Guard program was suspended by Locktons and the NRA in November 2017 Everything else – everything that we’re talking about here happened after November 2017. Her meeting with Lloyd’s, Lloyd’s did not underwrite Carry Guards. And her meeting with Lloyd’s says cut your ties with gun groups, especially the NRA, because I’m trying to weaken them. Gun groups don’t have Carry Guard. Only the NRA did. It wasn’t even operative at that point.

The guidance letters say nothing about Carry Guard. This is not a guidance letter about insurance infractions. This is a guidance letter about the NRA and other gun promotion organizations.

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Furthermore, the guidance letters issued were not targeted solely at the NRA, but as the title points out, were “Guidance Regarding the NRA and Other Gun Promotion Organizations”. If this were a question of punishing the NRA for their actions, why involve other gun promotion organizations?

During his arguments, Mr. Katyal made a point that caught my

interest.

And that's why, if you let this complaint go forward, you will be then saying to government regulators everywhere that you have to be careful about the speech you say. So, for example, last week, some of you heard the President say, you know, we beat the NRA, we're going to beat the NRA again.

You heard my – in the first argument a discussion about TikTok and – and, you know, a government – a hypothetical in which the government attacks TikTok and criticizes it. The – all of those things – those statements now will be used as – in examples in affirmative litigation to – to issue strike suits to stop enforcement actions by the FTC, by the Justice Department, by states and the like.

And, Justice Kavanaugh, I am troubled by the fact the Solicitor General isn't embracing that, but I do think it's important to point out many states are.

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Not only does it appear that Mr. Katyal is concerned that by punishing government actors who target individuals, groups, or ideas would actually lead to more complaints when they do so, but he's concerned that the Solicitor General's office is not concerned that they may be held accountable for their actions. That sounds an awful lot like his position is we shouldn't punish government actors for targeting political opponents because people will sue.

Conclusion

There are several things in this case that I have problems with. First of all is the fact that at no time during oral arguments did anyone actually quote the Constitution of the United States. Perhaps if they did, someone would have noticed that this cannot be a violation of the First Amendment since

Congress had nothing to do with it.

Congress shall make no law ... abridging the freedom of speech, or of the press;

[U.S. Constitution, Amendment I](#)

That's not to say this isn't a free speech case, it's just not a First Amendment case. Freedom of Speech is protected by Article I, Section 8 of the Constitution of the State of New York.

Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

[New York Constitution, Article I §8](#)

There are several aspects of the Fourteenth Amendment I can see being violated here.

... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[U.S. Constitution, Amendment XIV](#)

By targeting a specific organization, Ms. Vullo has deprived both the NRA, its members, the insurance companies, and the banks, the liberty to do business not as a punishment for the crimes the NRA committed, but because of the industry they are in. Also, by targeting both the NRA and other members of the gun industry, Ms. Vullo has unequally applied the laws of the State of New York.

How the Supreme Court decides this case should be interesting. While it is extremely difficult to predict how the court will find, I feel fairly confident that no matter what decision the court makes, it will not be based on the Constitution of the

United States.

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